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IN THE

Supreme Court of the United States

October Term, 1965

Nos. 709, 733

IN THE MATTER OF THE PETITION OF H. LESLIE ATLASS FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS THE OWNER OF A CERTAIN VESSEL KNOWN AS THE YACHT SIS.

No. 709

CATHERINE MUTH, Administratrix of the Estate of Clem Muth, Deceased.

Petitioner,

versus

HARRIET ATLASS and Chicago Title & Trust Company, Executors of the Will of H. Leslie Atlass,

Respondents.

No. 733

MOLLIE DARR, Administratrix of the Estate of Kurt Darr, Deceased.

Petitioner,

versus

HARRIET ATLASS, and Chicago Title and Trust Company, Executors of the Will of H. Leslie Atlass,

Respondents.

On Petition for Rehearing to Grant a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE.

BRIEF OF AMICUS CURIAE ON BEHALF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION

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American Trial Lawyers Association respectfully moves for leave to file a brief *amicus curiae* in the case. The consent of the attorneys for petitioners has been obtained. The consent of the attorney for respondents was requested but refused.

The interest of the American Trial Lawyers Association arises from the fact that it is a national bar association of trial attorneys who are vitally interested in a uniform development of admiralty and maritime law in a manner consistent with the protection and furtherance of the rights of seamen and other persons similarly situated. The association publishes legal periodicals and follows the development of the admiralty and maritime law under the supervision of its special section on admiralty law.

In the instant case, although petitioners have previously presented their contentions, your applicant believes that further discussion should be devoted to the question of whether the court below has correctly interpreted the proper standards of review in reversing the findings and judgments of the district court. It is believed that the accompanying brief, which *amicus curiae* is requesting permission to file, contains a more

complete discussion of this issue. If this argument is accepted it would be dispositive of this case.

Respectfully submitted,

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STATEMENT OF FACTS

A petition for Limitation of Liability was filed in the United States District Court for the Northern District of Illinois praying for an exoneration from, or in the alternative, limitation of liability from claims asserted, or to be asserted, under the Jones Act (46 U.S.C.A. §688) for the death of two seamen. Their personal representatives appeared as claimants and answered the petition.

The District Court, sitting in Admiralty, rendered judgment for claimants against the petitioner as owner of the vessel and employer of the decedents. The awards were reduced by findings of contributory negligence, and the total was limited to the value of the vessel.

The District Court rendered findings of fact and conclusions of law, presumably in an effort to conform with Admiralty Rule 46-1/2.

Pertinent portions of the findings of fact, rearranged numerically to more directly present our point, are:

"16. On October 23, the yacht was placed on a ma-

rine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail from that time until after Muth and Darr drowned.

17. While she was on the marine rail, ingress to and egress from the yacht could be accomplished only by means of a ladder between the rail bed and the gangway on the starboard side, slightly forward of midships.

36. At the time of the drowning, the "Sis" was a vessel in navigation.

18. While the "Sis" was on the marine rail, toilet and cooking facilities on board could not be used. The crew continued, nevertheless, to sleep on board. Muth, Mendel, Smith and Wasilas, among others, slept in the crew's quarters as they had each night after the vessel left Chicago. Johnson, who with Darr had been sleeping in the officers' quarters, stayed in a hotel after October 23; Darr slept in a hotel one of the nights October 23-24 and in the officers' quarters the other night. Atlass, who had slept in the master stateroom, moved to a hotel on October 23 and returned to Chicago on October 24.

19. When Atlass left Detroit on October 24, he told Johnson that he was in charge and that the yacht was to be repaired and readied to continue to Florida. Thereafter, Johnson gave directions and orders and paid for meals eaten by the men.

28. Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were

taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages.

29. Muth, Darr and Smith left Garvin's Bar together. Muth soon commenced staggering and had to be assisted by the other two. At one point, Muth slipped and fell into the street and had to be aided to his feet.

30. The three proceeded to the Detroit Yacht Basin where the outside door to the boat shed was locked. They rang for the night watchman who came, turned on the overhead lights in the shed and unlocked the door to let them pass through. As they did so, Muth was staggering and Darr, on Muth's left, was assisting him. Smith followed, a few steps behind.

31. The three men turned south down the walkway. Opposite a point between the first and second stanchions, about 15 feet south of the northern terminus of the walkway, Muth fell into the gap between the walkway and the rail bed. Immediately, Darr jumped in to try to save Muth.

32. Wasilas and Mendel, both asleep on the yacht, were awakened by Smith's cries for help. By the time they reached the walkway where Smith, who was unable to swim, was shining a flashlight into the water, Darr had disappeared from sight. Wasilas and Mendel jumped into the water to assist Muth, but they were unable to rescue him.

27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap.

37. Minimum levels of lighting recommended by the Illuminating Engineering Society are the following: general areas of shipyards, 5 foot candles; freight and passenger piers, 20 foot candles; inactive pedestrian and/or conveyor entrances normally locked and infrequently used, 1 foot candle.

38. At the time of the drowning, illumination on the walkway, dock and rail bed was less than one foot candle.

39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient.

40. Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had

been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

Pertinent portions of the conclusions of law are:

"2. Muth and Darr were seamen within the meaning of the Jones Act, 46 U.S.C. § 688, at the time of their deaths. See Carumbo v. Cape Cod S. S. C., 123 F. 2d 991 (1st Cir. 1941).

3. From October 18, 1956, when the voyage commenced, to and including the time of the drownings, Muth and Darr were borrowed servants of Atlass', and accordingly he was their "employer" within the meaning of the Jones Act.

4. Under the Jones Act, an employer is liable for injuries to or death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. This duty extends to an area in close proximity with the gangway or gangplank such as the place where Muth and Darr drowned. Cf. Marceau v. Great Lakes Transit Corp., 146 F. 2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

5. Negligence of seamen-employees which proximately contributes to their injury or death reduces

proportionately the amount of damages which may be recovered of the employer.

8. The following damages, which must be reduced by 50% (the contribution to Muth's death of his own negligence), have been sustained by claimant Catherine Muth:

10. The following damages, which must be reduced by 30% (the contribution to Darr's death of his own negligence), have been sustained by claimant Mollie Darr:"

The Seventh Circuit Court of Appeals rendered an order reversing the trial court. In holding that the intoxication of the two deceased seamen was the *sole cause* of their deaths, it in effect directed the trial court to dismiss the claimants' action.

The opinion of the appellate court found fault with the judgment of the trial court in two respects: firstly, that there was no expressed and well articulated finding of fact that the employer or his agents had been negligent in their conduct; and secondly, that there was no expressed and well articulated finding of fact that the negligence, assuming such to have existed, had played a part in causing the accident.

Lacking an expressed determination by the trial court of these findings of fact, the appellate court assumed the role of fact-finder and determined that there was no negligence nor causation.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

The decision, which is the subject of the petition for writ of certiorari, involves the following conflicts, interpretations and rulings:

I. BY REQUIRING AN EXCESSIVE ADHERENCE TO ADMIRALTY RULE 46-½ THE SEVENTH CIRCUIT COURT OF APPEALS HAS IGNORED THE MANDATE OF THIS COURT IN MAKING AN OBLIQUE ATTACK UPON THE SCHEME OF APPELLATE REVIEW OF ADMIRALTY AND MARITIME CAUSES OF ACTION

Amicus curiae respectfully differs with the method by which the appellate court arrived at its reversal of Honorable Hurbert L. Will, Judge of the District Court for the Northern District of Illinois. The trial court clearly stated in his finding of fact No. 39 that the employer failed to provide a safe means of egress from and ingress to the vessel. He was doubtlessly aware of the propensity of seamen to imbibe to excess while on shore and their resulting need of a safer means to board the vessel. The standard of care due an intoxicated seaman should be higher than the standard owed to a sober seaman. Judge Will presumably decided that the lighting was inadequate to illuminate the way for helpless or partially helpless inebriated seamen. Judge Will would not have rendered judgment in favor of the claimants had he not believed it reasonable that there was some negligence that played

a part, no matter how slight, in causing the deaths of the two seamen. His conclusions of law demonstrate that he was aware of the applicable principles of law to be followed. Because there was a valid basis for reasonable inference that the employer's negligence played a part in causing the drownings, there was no opportunity for the appellate court to find that the trial judge was clearly erroneous in his findings.

The appellate court did not decide that the judgment was clearly erroneous, but rather decided that certain findings of fact were not listed by the trial judge. The Seventh Circuit Court of Appeals by its excessive adherence to Admiralty Rule 46-1/2[1] is in conflict with the Fifth Circuit decision of *Myles v. Quinn Menhadden Fisheries, Inc.*[2]

We submit that to permit the appellate court to require overly rigid adherence to Admiralty Rule 46-1/2 is to open the door for oblique attacks upon the decisions of the district court judges who have heard the evidence, have observed the demeanor of witnesses and were better situated to weigh the evidence and determine the facts.

This Honorable Court has an interest in resolving the conflict between the two circuit courts of appeal.

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[1]Admiralty Rule 46-1/2 provides *inter alia:* "In deciding cases of of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . ." We submit that this rule removed the fact finding function from the appellate court by reserving this function exclusively for the trial court.

[2]302 F2d 146 (CA 5th Cir 1962)

II. THE SEVENTH CIRCUIT COURT OF APPEALS, BY MAKING INDEPENDENT FINDINGS OF FACT THAT WERE SUPPOSEDLY OMITTED BY THE TRIAL COURT, HAS CREATED A CONFLICT BETWEEN THE CIRCUITS, AND ALSO IS IN CONFLICT WITH THE RULES AND DECISIONS OF THIS COURT.

Let us assume *arguendo* that the trial court did omit crucial findings of fact upon which to base its judgment.[3] In that event the appellate court's independent determination of the omitted findings of fact is in essence a trial *de novo* as to those facts. This is contrary to Admiralty Rule 46-1/2[4] which delegates the fact finding function exclusively to the district court. It is contrary to that body of the decisional law[5] (adopted by

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[3]As discussed *supra*, the appellate court predicated its reversal on the announced theory that the trial court failed to make the requisite findings of negligence on the part of the employer or his agents which caused in whole or in part the death of the two seamen. With this we do not agree since we feel that those findings were implicit in the judgment of the Court. However, if we accept for purposes of argument that there was no such finding then the next question to be answered is which tribunal is empowered to make those initial fact determinations? The appellate court assumed that it had the power and discretion to make *new* findings of fact. Obviously non-existent findings can not be said to be erroneous findings. What then is the source of the appellate court's power?

[4]*Supra* note 1.

[5]Many of the circuit courts of appeal have ruled unequivocally that if the findings as to particular significant facts have not been made by the trial court the appellate court cannot do this for them — the case must be remanded. Jones v. Waterman S.S. Corp., 155 F 2d 992 (CA 3rd Cir 1946); Owen v. Commercial Union Fire Ins. Co. of New York, 211 F 2d 488 (CA 4th Cir 1954); Myles v. Quinn Menhadden Fisheries, Inc., 302 F 2d 146 (CA 5th Cir 1962); Clarke Hybrid Corn Co., Inc. v. Stratton Grain Co., 214 F 2d 7 (CA 8th Cir 1954); Irish v. U. S., 225 F 2d 3 (CA 9th Cir 1955); J. P. Gibbins, Inc. v. Utah Home Fire Ins. Co., 202 F. 2d 469 (CA 10th Cir 1953); Schilling v. Schwitzer-Cummins Co., 142 F. 2d 82 (App D. C. 1944).

this court in *McAllister v. U. S.*,[6]) which requires the reviewing court upon discovery of a substantial omission in the findings of fact to remand the cause to the district court to supplement its findings of fact. The decision below, if not rectified, will stand for the proposition that the appellate court may conduct a trial *de novo* on those omitted facts; this we submit, is in conflict with the principle of law advanced by this Honorable Court in *McAllister*.

For the appellate court to reject fact findings and substitute its own, is no less a trial *de novo*. The trial judge, who heard and observed, found that the walkway was obstructed; the court of appeals reevaluates the evidence, and reaches a contrary conclusion. The district judge found that the lighting was insufficient; the appellate court disagrees, and decides that actually the illumination was adequate. The court of first impression found that the first seaman was 50% at fault, and that the second decedent who attempted the rescue was 35% at fault; the Seventh Circuit determined on appeal that the first man was 100% at fault, and likewise the rescuer was was 100% at fault.

If the ends of justice require further determination with regard to the facts, the case may be remanded for a new trial to the district court which is the proper forum for fact finding.

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[6]McAllister v. U. S., 348 U. S. 19 (1954); see also Interstate Circuit, Inc. v. U. S., 304 U. S. 55 (1938).

CONCLUSION

The decision of the court below has national significance. Other than a normal desire to prevent injustice, the *amicus curiae* has no further interest in the outcome of the proceedings between these individual litigants. However, we are of the opinion that the disturbing influence created by this decision upon the admiralty and maritime law is to be avoided and merits the attention of this Honorable Court.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon all counsel of record by placing the same properly addressed in the U. S. mail with adequate postage affixed thereto.

February 14, 1966